Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MOUNTAIN AMERICA, LLC, *et al.*,

Petitioners,

v.

DONNA HUFFMAN, ASSESSOR OF MONROE COUNTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a taxpayer's objection on Equal Protection grounds, to its arguably excessive *ad valorem* property tax assessment, may be defeated by a separate neighborhood designation which is based exclusively on recent market pricing differences with otherwise comparable properties?

2. Whether a taxpayer's objection on Equal Protection grounds, to its arguably excessive *ad valorem* tax assessment based on the recent prices paid for neighboring properties, though supported by proof of its property's comparability to other, much lower assessed properties, inherently fails due to the absence of a separate appraisal of the taxpayer's property?

3. Whether a taxpayer's objection on Equal Protection grounds, to the arguably excessive *ad valorem* tax assessment of its property relative to the assessments of other comparable properties, may be defeated by the contention that the systematic annual underassessment of the other properties occurred over several years prior to the taxpayer's acquisition of its property and, thus, did not preclude prospective seasonal cure of the disparity?

4. Whether the institutional interest of the county commission in the fiscal affairs of the county, as it considered the merits of the petitioners' objections to their *ad valorem* property tax assessments, constituted a facial violation of their rights to Due Process?

5. Whether the personal pecuniary interest of the individual members of the county commission, in the outcome of its review of the petitioners' objections to their *ad valorem* property tax assessments, violated the petitioners' rights to Due Process?

6. Whether the cumulative effect of the process by which the petitioners were required to challenge their *ad valorem* property tax assessments, as administered by the assessor and the county commission and as construed by the courts below, constituted a violation of the petitioners' rights to Due Process?

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

1) A list of all parties in the lower court whose judgment is the subject of this petition is as follows:

Petitioners:

Mountain America, LLC; Feroz Alloo; Robert and Beverly Amico; William Andrews; William and Nancy Atkins; Sergio and Cheryl Baez; Thanos Basdekis; Edward and Tracy Bober; Peter Calderon; Jimmy Carroll; Chris and Dina Cashwell; Bob and Linda Chamberland; Wayne Clibum; Peter and Sherry DelCloppo; John Eagle; Dale and Michelle Enzor; Charles and Cynthia Evans; William Farley; Lon Fountain; Esther Halperin; Jonathan Halperin; Stan and Donna Hardman; Mike and Vivian Hollandsworth; Jan Jerge; Carlos and Cindy Kinsey; Freda Livesay; Victor Long; Jim and Shayna Mackey; William and Carol Matthews; Jean Jacques Millard; Matthew Myers; Forest and Carol Newman; Stephen and Lauren Rice; Michael Robey; Hee Soo Roh; George Ross; Robert Schlossberg; Neil Patrick Welsh; Obie Woods, Jr.; Gulam Younossi, Salvatore Zambri; WBMA LLC; Walnut Ridge LLC; Sugar Tree, LLC; JF Investment Holdings; and Greentree LLC

Respondents:

Donna Huffman, Assessor of Monroe County;
and
The Monroe County Commission, Donald Evans, Clerk, and Monroe County Commission Sitting as the 2007 Board of Equalization and Review

2) With respect to corporate disclosure, Mountain America, LLC is the majority member for all limited liability companies listed above. No other petitioner named herein has a parent corporation. Further, no publicly held corporation has a 10% or greater ownership interest in any of the petitioners named herein.

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Mountain America, LLC, et al ("the petitioners") respectfully petition for a Writ of Certiorari to review the opinion and judgment of the West Virginia Supreme Court of Appeals.

OPINIONS BELOW

The published opinion of the West Virginia Supreme Court of Appeals, dated November 25, 2009, is officially reported at Mountain America, LLC v. Huffman, —S.E.2d, 2009 WL 4110951 (W. Va. Nov. 25, 2009) (NO. 34426), and is reproduced at Appendix A.

The Order of the Circuit Court of Monroe County, West Virginia, entered January 28, 2008, is unpublished but is reproduced at Appendix B.

The Order issued by the County Commission of Monroe County, West Virginia, dated February 15, 2007, is unpublished but is reproduced at Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the United States Constitution, U.S. Const., Amend V, reprinted at Pet. App. E1, the Equal Protection Clause of the United States Constitution, U.S. Const. Amend XIV, §1, reprinted at Pet. App. E2 and W. Va. Code § 11-3-24 governing Review and Equalization by County Commissions, reprinted at Pet. App. E3.

STATEMENT OF THE CASE

The petitioners respectfully seek this Court's review of the decision and final order of the West Virginia Supreme Court of Appeals (the "court below") issued on November 25, 2009. See, Appendix A, *infra.* In its order, the court below affirmed an order of the Circuit Court of Monroe County, West Virginia (the "circuit court"), entered on January 25, 2008. See, Appendix B, *infra.* The circuit court's order denied the petitioners' petition for appeal from certain *ad valorem* property tax assessments initially proposed by the Assessor of Monroe County, West Virginia (the "assessor") and upheld in an order issued by the County Commission of Monroe County, West Virginia (the "county commission"). See, Appendix C, *infra.*

The petitioners are Mountain America, LLC ("Mountain America"), along with several dozen individuals, who own lots and undeveloped residue in an the area of Monroe County, West Virginia, designated as the Walnut Springs Mountain Reserve ("Walnut Springs") and being developed by Mountain America, and five (5) other related entities.

Walnut Springs consists of several parcels, containing together approximately one thousand (1,000) acres, which were acquired over the last several years by Mountain America and its related entities with the general intent to develop it for residences and related amenities. Walnut Springs was, as of July 1, 2006 (the statutory status date for assessment of 2007 *ad valorem* property taxes in West Virginia), and still remains, in the initial stages of development, but, subject

to a recovery of the residential real estate market, its developers have plans to provide buried utilities, a private road system and other amenities, in addition to a rural community living environment, throughout the property.

The developed lots are subject to uniform restrictions and covenants recorded in the Monroe County land records.. February 7, 2007, Hearing Transcript [hereinafter, "Tr."] p. 101; Assessor's Exhibit [hereinafter, "Assr's Ex."] 10. The restrictions and covenants are recited in the deeds for individual lots which have been conveyed by Mountain America and the other entities to the other petitioners. E.g. Assr's Exs. 1, 3. Those restrictions reflect an intent to provide for primarily residential uses, but they do give the developer the discretion to permit other uses. Neither Mountain America, nor any other entity or person developing Walnut Springs, has recorded a separate development plat or designation of land use. Tr. pp. 97-98.

Between July 1, 2006 and January 31, 2007, the assessor and her staff were engaged in the process of determining taxable values of property in Monroe County. As part of that process, the assessor undertook the valuation of real properties owned by the petitioners in Walnut Springs. In doing so, a determination was made either independently by the assessor, or by her in consultation with the West Virginia State Tax Department (the "Tax Department"), to treat Walnut Springs as an entirely new "neighborhood" for tax assessment purposes. Tr., pp 96-97. To the extent that the assessor understood the geographic scope of Walnuts Springs, consisting of both the sold lots and the undivided residue, the neighborhood she created included only Walnut Springs and excluded contiguous properties. Tr. pp.114-117.

While the assessor was creating a new neighborhood for Walnut Springs, and for at least ten (10) years prior to that time, her office had been cited by the Tax Department for many deficiencies in its annual valuation and assessment work. Tr., pp. 70-80. Specifically, the assessor's office had failed several appraisal study tests conducted by the Tax Department pursuant to the latter's oversight responsibilities. Assr's Exs 6-8; Petitioners' Exhibits [hereinafter, "Ptrs' Exs."] 15 -17. Those tests were designed to reflect, in the aggregate, a general measure of compliance within permitted deviations between the assessor's land book values and actual market values for the relevant periods. Moreover, the preliminary reports of the results of those tests for September and December of 2006, reflected a continuing failure by the assessor on nearly every test conducted by the Tax Department. Assr's Exs. 7-8, Ptrs' Exs. 15-17.

At the same time in 2007, due to the assessor's failure to update the taxable values of other real property in the immediate vicinity of Walnut Springs, a significant deviation resulted between the percentage of fair market value at which the taxable values of the petitioners' properties were set as compared to the taxable values of those nearby parcels and most other real property in Monroe County. Tr., pp. 13-19, Ptrs' Exs. 4-9.

Thus, the assessor set the tax assessments (i.e. taxable values based on 60% of appraised fair market value) of the property of Mountain America at the total amount of Four Hundred Thirty Six Thousand Nine Hundred Eighty Dollars ($436,980) and the total amount of the assessments of the other petitioners' properties at Nine Million One Hundred Sixty Seven Thousand One Hundred Sixty

Dollars ($9,167,160). In January, 2007, notices of their respective assessments were mailed to the petitioners, most of whom lived outside of West Virginia. At the end of that same month, the assessor delivered to the county commission her property books containing the proposed tax assessments of all property in Monroe County.

Upon learning of the taxable values determined by the assessor for their respective properties, the petitioners filed, on a timely basis, with the county commission their applications for review of, and relief from, their assessments A hearing of most of the petitioners' applications for relief was held before the county commission on February 7, 2007 (the "hearing"). At the hearing, the petitioners argued and presented evidence in support of their contention that their assessments violated their rights under the "equal and uniform" taxation provision of the Constitution of West Virginia and under the Equal Protection Clause of the United States Constitution.

At the hearing, it was revealed that the similar and contiguous, or closely proximate, properties just outside the confines of the newly created Walnut Springs neighborhood had taxable values set for them by the assessor which were, on average, $606 per acre, as compared to the taxable value she set for the residue of the petitioners' properties in Walnut Springs at $5,400 per acre. Tr., pp. 16-17, 31-32; Ptrs' Ex. 8.

The testimony of the petitioners' appraiser, and the related exhibits, further showed a large difference between the values urged by the assessor for the properties of the Walnut Springs lot owners which were,

on average, in a range between $26,000 to $30,000 per acre, when compared to the values she would set for the lots in a more established residential neighborhood in Monroe County. Tr., pp. 17-20, 32-34, 38-39; Ptrs' Exs. 9 and 11.

Specifically, Longview Estates is a subdivision of residential lots in Monroe County that has relatively more completely developed infrastructure, water, sewer, roads, etc. than Walnut Springs. However, a detailed sampling of the Longview Estates lots reflects that the values in the 2007 land books proposed by the assessor for them were at an average of $2,640.50 per acre. Tr., pp. 17-18, 37-40.

Further, the petitioners' appraiser, on the basis of his review of recent sales prices of property in Monroe County gleaned from its public records, found that, for the several dozen parcels of the petitioners' properties in Walnut Springs, the assessor's values ranged from a low of 15% of recent sales prices to a high of 438% of recent sales prices, with an average value, proposed by the assessor, of 152% of their documented recent sales prices. Tr., pp. 13-14; Ptrs' Ex. 4. However, based on a random sample of 113 sales, between July 1, 2004 and June 30, 2006, of other parcels elsewhere in Monroe County (also from the public records), it was determined that the 2007 values for those other properties, proposed by the assessor were, on average, only 38.15% of their recent sales prices. Tr., pp. 14-15; Ptrs' Ex. 5.

Another sample of several dozen properties in Monroe County outside of Walnut Springs, that were sold subsequent to July 1, 2006, were assigned taxable

values by the assessor which were, on average, only 47.13% of their recent sales prices. Tr, p.15; Ptrs' Ex. 6. Additionally, there were six (6) properties in the sample whose taxable values, as set by the assessor, were less than eight percent (8%) of their recent sales price and averaged only 5.42% of their sale prices. Tr., p. 15; Ptrs' Ex. 7.

Overall, for 2007 taxes, there was an aggregate increase in the taxable values of *all* lands in Monroe County of $29,591,216.00. Of that amount, $10,908,366.00, or 36.86%, was solely attributable to increases of the proposed taxable values of the petitioners' properties set by the assessor. Tr. p. 19; Ptrs' Exs. 10-11. At the same time, the property in Walnut Springs represents only one half of one percent (0.5%) of the land area of Monroe County. Tr., pp 14, 19.

Also, at the hearing, when asked about the tests undertaken by the Tax Department to measure fairness and equality of the Monroe County land books, the assessor could not identify the types of tests, how they worked, the names of the tests or how they measured equality or fairness of the property tax values she had set. Tr, pp. 71-78. Rather, the assessor stated that her failure to comply with the Tax Department tests was due to the recent sales of properties in Walnut Springs and that across-the-board increases she was making would correct these deficiencies. Tr., pp. 95-96, 111-116. Previously, however, she acknowledged that the longstanding undervaluation of real property in Monroe County predated the sales activity that occurred in Walnut Springs. Tr., pp-77-80. Nevertheless, the subsequent sales/assessment ratio studies conducted by

the Tax Department, which included the assessor's 2007 valuations for Walnut Springs, revealed continuing non-compliance with those tests.[1]

The assessor was unclear about what uses the restrictive covenants applicable to the petitioners' properties permitted or did not permit. Ultimately, she did recognize that the covenants did not preclude the development of the unsold residue of Walnut Springs as commercial property. Tr., pp. 78-81, 107-111. At the same time, in setting its value, she made a determination that the residue should be valued as residential property since she believed that was its "proposed use." Tr. pp 79-80. At the same time, the assessor had not adjusted the taxable value of other commercial land in Monroe County in the current or recent years because she said she did not have adequate sales data to do so. Tr., pp. 78-81.

After the hearing, the county commission voted unanimously to sustain all of the petitioners' assessments. A written notice of the county commission's order, dated February 15, 2007, was mailed

1. The Petitioners note that the cited June 4, 2007 report is not part of the official hearing record in this matter since it did not exist prior to the date of the filing of their appeal to the circuit court. However, it is a judicially noticeable fact and public record which was made relevant by the assessor's above explanation of her actions, and which reveals the continued non-compliance of her office as to this State-monitored sales ratio equality standard. Further, the petitioners appealed their 2008 property tax assessments, and reports of the sales/assessment ratio studies conducted in 2008 show continued non-compliance by the assessor.

to the petitioners' counsel. See, Appendix C, *infra*. The county commission's decision indicated that it was based solely on the otherwise unexplained finding that the assessor's methods of appraisal were pursuant to West Virginia Law. Id.

On March 14, 2007, the petitioners filed their petition for appeal in the circuit court seeking review of the county commission's order. Concurrently, and as a legally integral part of their petition, a certified and complete record of the proceedings before the county commission was filed with the circuit court. On March 28, 2007, counsel for the county commission filed a response opposing the petitioners' appeal and on April 13, 2007, counsel for the assessor filed a separate response to the appeal.

Thereafter, following the presentation of briefs and argument, by its order entered January 25, 2008, the circuit court sustained the assessments. Whereupon, on May 27, 2008, the petitioners petitioned the court below for review of the circuit court's order. Upon that review, the court below affirmed the order of the circuit court. [2]

[2] Pursuant to the Court's Rule 14.1(g)(i), because they are relatively voluminous, the citations and quotations from the record, showing the manner in which the federal questions presented here were raised by the petitioners and passed on by the state courts below, are set forth in Appendix D, *infra*.

REASONS FOR GRANTING THE PETITION

The Court should intervene in this matter to preclude the erosion of its prior mandates: (1) recognizing the role of Equal Protection rights in the context of *ad valorem* property taxation and (2) protecting Due Process rights when the exercise of adjudicatory authority is contaminated by official or personal conflicts of interest and other prejudicial arrangements. Specifically, in its opinion, the lower court qualified the application of this Court's *unanimous* holding in *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va.*, 488 U.S 336, (1989), that a West Virginia county's systematic and long-existing underassessment of comparable properties violates the Equal Protection rights of adversely affected taxpayers. Likewise, the opinion of the court below restricted the effect of this Court's holdings in *Ward v. Village of Monroeville, Ohio* 409 U.S. 57 (1972) and *Tumey v. State of Ohio*, 273 U.S. 510 (1927), that actual official bias, much less the strong appearance of personal bias, of adjudicating officials violates a litigant's right to Due Process.

I. A taxpayer's objection on Equal Protection grounds, to its arguably excessive *ad valorem* property tax assessment, may not be defeated by the use of a separate neighborhood designation which is based exclusively on recent market pricing differences with otherwise comparable properties.

The court below held that the assessor's designation of the petitioners' properties as a new, separate neighborhood justified her disparate treatment of them for tax assessment purposes.[3] In so holding, the court below concluded that the assessor followed the guidance of West Virginia Tax Department officials, and followed its Administrative Notice 2006-16 (the Notice). Administrative Notice 2006-16, (W. Va. State Tax Dept. January 31, 2006). However, there is nothing in the assessor's testimony that refers to the Notice, or that reflects her awareness, much less understanding, of it or of her applying it in a uniform manner to other comparable neighborhoods in Monroe County. Tr., pp. 119-122.

Specifically, the Notice provides that "[t]he local assessor divides his or her county into 'neighborhoods' giving consideration to similarities such as parcel size, roads, topography, costs, type and quality of improvements *for land pricing*." Id. (Emphasis added). In addition, the Notice defines a "neighborhood" as

3. The official opinion of the court below in *Mountain America, et al. v Donna Huffman, Assessor of Monroe County*, No. 34426, __ W.Va. ___, ___ S.E.2d ___, 2009 WL 4110951 (W. Va. 25, 2009) (No. 34426), at page 34 (hereinafter, Opin., p. ___). See, Appendix A, *infra*.

being "a geographical area exhibiting a high degree of homogeneity in residential amenities, land use, economic and social trends and housing characteristics." Id. Here, the assessor's determination, that the petitioners' properties should be separated from all others in the county, violates the cited requirements in a number of ways.

First, she did not include in the new neighborhood identical contiguous or proximate properties with similar parcel sizes, roads, topography, etc. Tr., pp 116-117. Specifically, the testimony of the petitioners' appraiser and Petitioners' Exhibit 8 identify dozens of such properties. Tr., pp. 16-18, 31-33, 39-40. However, the assessor admitted in her own testimony that those excluded nearby properties basically had the same physical characteristics and limited development status as those in Walnut Springs. Tr., p.117. In addition, those other properties were similarly devoid of actually constructed dwellings on them as was most of Walnut Springs.

Second, the *only* rationale the assessor offered, for designating the petitioners' properties as a separate neighborhood, were the relatively higher prices for which they had been recently transferred – the classic "welcome stranger" approach that this Court *unanimously* rejected in *Allegheny Pittsburgh*.[4]

4. As in *Allegheny Pittsburgh*, this case presents an example of the "welcome stranger" assessment practice whereby newly arriving purchasers of property are taxed on the basis of the recent, typically higher prices they pay, while the taxes on long-held and unsold properties of others remain as they have, for extended periods, based on the lower market prices applicable when they were acquired.

Specifically, at the hearing the assessor was asked "[w]hy did you decide that [Walnut Springs] is the neighborhood, as opposed to some larger geographic area?" Tr., p. 116. The assessor's response was: "Because this is the only area that sold as high as they have in our county. Nothing else in our county is selling like this, so I had to." Id. Indeed, despite its ruling on purely procedural grounds, that the owners of the lots in Walnut Springs had not perfected their appeals to the circuit court, the court below readily acknowledged the fact, if not the legal significance, of such disparities in taxation. Opin., p. 39.

Thus, instead of properly applying the neighborhood designation procedures requiring comparisons of the various land features and improvements factors, as directed by the Notice, all for the purpose of determining land prices, the assessor, oppositely, used nothing but land prices to determine the new neighborhood. As a result, the assessments she set for the individual sold lots in Walnut Springs were ten (10) times higher per acre than the assessments she set for the lots in the comparable residential subdivision and the assessments she set for the unsold, undivided residue of Walnut Springs were nine (9) times higher per acre than the assessments she set for the comparable neighboring property.

Nevertheless, the court below would justify such disparate treatment of Walnut Springs, not on the comparability with other properties in the county based on actual current land features and similarly limited improvements, but on the grounds that: (1) the other properties, adjacent to Walnut Springs, always sold for

much less, and (2) amenities existing at Walnut Springs distinguished its properties from others in the county. Opin., p. 39. The former, while factually accurate, begs the central question at issue here, to-wit: whether, notwithstanding their recent pricing disparities, the properties inside and outside of Walnut Springs are intrinsically comparable so as to mandate the imposition of relatively equal tax burdens.

As to the purported amenities, the record is clear that no such distinguishing features existed over the greatest portion of Walnut Springs. Tr., p. 117. Rather, for the most part, such amenities were merely on Mountain America's drawing board for future installation. As such, the mere future prospect of such improvements, understandably "touted" by Mountain America, as the court below wrote, does not, as a matter of law, justify any consideration of them in setting current tax assessments.

Specifically, W.Va. Code § 11-3-1b(c) expressly prohibits the assessor from considering or using a proposed future use of a property to determine its value for current tax purposes. Likewise, the Tax Department's legislative regulations, applicable to these matters, unambiguously direct that "[p]roposed land use may not be used as a basis for valuation until the actual use has changed to correspond with the proposed use." 110 Code of State Regulations, Series 4, § 5.1. Thus, in establishing a separate new neighborhood only for the petitioners' properties, the assessor failed to follow official procedures established for such purposes, and, instead, singled them out for much heavier taxation than that imposed on comparable properties.

Moreover, in approving the assessor's abuse of her authority to segregate the Walnut Springs properties into a separate neighborhood, the court below relied on non-existent physical differences between the Walnut Springs lots and residue, on the one hand, and the comparable properties, on the other. On that basis, and its view that recent higher prices alone required Walnut Springs to bear a heavier tax burden than otherwise comparable properties, the court below endorsed such discriminatory treatment. Opin., pp. 34-36. If the use of such a device, and such circular reasoning, to defeat Equal Protection rights is to be avoided, the ruling of the court below should be reviewed.

II. A taxpayer's objection on Equal Protection grounds, to its arguably excessive ad valorem tax assessment based on the recent prices paid for neighboring properties, though supported by proof of its property's comparability to other, much lower assessed properties, does not inherently fail due to the absence of a separate appraisal of the taxpayer's property.

That, the recent, arms-length prices paid for properties are compelling indicators of their current values, is beyond dispute. Such data is also the primary metric employed to estimate the values of comparable adjacent properties. Thus, in determining the taxable value of Mountain America's residual property, and of the lot owners' properties in Walnut Springs, the assessor referred to the relatively recent arms-length prices paid for the latter. Tr., pp. 84-85, 120-121. However, in rejecting Mountain America's Equal Protection claim challenging that taxable value, the court

below emphasized the failure to present evidence of its properties' current values. Opin., p. 33.

It is apparent from the record that, to determine the per acre taxable values she set for Mountain America's residual property, the assessor used the average price per acre the other Walnut Spring lot owners paid for their properties between July 1, 2005 and June 30, 2006, and discounted it, through a computer program, to reflect its status as undivided residue. Tr., 120-121. That fact, the mathematical objectivity of which the petitioner has never disputed, belies any contention that the current value of Mountain America's property was not proven or was a disputed issue in this case.

Furthermore, in the context of the petitioner's Equal Protection claim, an equally critical fact is that the taxable values set by the assessor for Mountain America's undeveloped residue property was nine (9) times the assessed values of adjacent and comparable properties of others. Tr., pp. 16-18, 31-32; Ptrs' Ex. 8. The evidence also showed that the Walnut Springs lots sold to the other petitioners were comparable in terms of all meaningful physical and geographic characteristics to the lots in another residential subdivision in the county the latter of which were, likewise, taxed on values set by the assessor that were one-tenth (1/10) of the values on which taxation of the Walnut Springs lots was based. Tr., pp. 17-18, 32-33; Ptrs' Ex. 9.

Such proof speaks directly to the central issues presented here because, as this Court recognized in *Allegheny Pittsburgh*, Equal Protection challenges to

ad valorem property tax assessments call for a comparative analysis. Specifically, there this Court ruled that: "[v]iewed in isolation, the assessments for the petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." *Allegheny* Pittsburgh, 488 U.S. 336, 346 (1989).

Thus, the ultimate issue under Equal Protection involves not so much the correct current value of the taxpayer's property, standing in isolation, but more concerns the amount of tax burden that property bears in relation to comparable property in the same jurisdiction. To be certain, the comparability of the various properties cited in this case, though based on the factors discussed above (e.g. location, typography, etc.) has been expressed in terms of a value per acre – based on recent prices paid per acre. It is precisely when relative tax burdens do not reasonably reflect such value comparisons that discriminatory taxation is shown.

Clearly, when the recent prices of the other Walnut Springs lots, on which such a separate appraisal of Mountain America's property would be based, were, in fact, the basis of the assessor's determination of its assessed value, such a separate appraisal would have added nothing to the consideration of the issues presented to the court below. Nor would it have made a difference in the proof, much less the legal significance, of the fact that the assessor set taxable values for the Walnut Springs properties which were, on average, based on 152% of those recent prices, while the taxable

values she set for the large samples of other property recently sold in Monroe County were between only 38% and 47% of their recent selling prices.

Thus, given the evidence in the record of all such facts, including the assessor's use of the recent prices paid for the lots in Walnut Springs to set the taxable values of Mountain America's properties, the absence of an additional current appraisal of those properties, cannot, *per se*, defeat its claim that such taxable values violate its Equal Protection rights. To honor such rights, as recognized by this Court in *Allegheny Pittsburgh*, the ruling of the court below to the contrary should be reviewed.

III. A taxpayer's objection on Equal Protection grounds, to the arguably excessive ad valorem tax assessment of its property relative to the assessments of other comparable properties, may not be defeated by the contention that the systematic annual underassessment of the other properties occurred over several years prior to the taxpayer's acquisition of its property and, thus, did not preclude prospective seasonal cure of such disparity.

In distinguishing this Court's mandate in *Allegheny Pittsburgh* from the instant matter, the court below emphasized that, unlike the taxpayers in that earlier case, petitioners had recently purchased their respective properties and, thus, had not already suffered the same decade-long discrimination proven in *Allegheny Pittsburgh*. Opin., pp. 39-41. In so ruling, the

court below reasoned that, because the pattern of underassessment of the properties of others by the assessor had not prejudiced the instant taxpayers over long enough a period, the theoretical prospect of future relief from such discrimination was sufficient to preclude their right to current relief. Id. Thus, the court below reasoned, given the timing of the onset of the discrimination against the taxpayers, the prospect of a near term cure of such discrimination was sufficient to address their complaint. Id.

Such an approach is at odds with the fundamental principles of Equal Protection as applied to *ad valorem* taxation. It also flies in the face of the evidence in the record before the court below that: (1) due to the treatment of Mountain America's residue as vacant, unimproved residential property for tax rate classification purposes, no attempt was being made to cure, seasonally or otherwise, any disparity between its assessment and that of other property falling in the same tax rate classification[5] (see, Tr., pp. 78-80, 101-102, 112); and (2) even on a compound basis, the rate of the assessor's upward across-the-board adjustment of other residential lots would take far more than ten (10) years

5. Although the assessor, based on her conclusion that the anticipated use of the residue of Walnut Springs was residential, treated it as such for valuation purposes, she acknowledged that, under West Virginia law, as vacant and unimproved property, it would not enjoy the more favorable class II tax rate classification, but would, instead, be taxed in the higher class III tax rate classification also applicable to commercial property. See, W.Va. Const., Art. X, § 1.

to equalize their tax assessments with those of the Walnut Springs lots.[6]

Clearly, temporary or occasional disparities in the equalization of property tax assessments among comparable properties are constitutionally tolerable and do not support Equal Protection claims by those shown to be only so briefly overtaxed. *Allegheny Pittsburgh*, at 343-344. However, as this Court also held, ten (10) or more years of such disparities become intentional and systematic – and cannot be excused as temporary or subject to seasonal cure. *Allegheny Pittsburgh*, 488 U.S. at 344.

Thus, in *Allegheny Pittsburgh*, it was the persistent, decade-long and unbroken pattern of discriminatory taxation against at least three (3) different taxpayers in Webster County which led to this Court's unanimous reversal of the lower court. If which of those taxpayer(s) were entitled to relief turned on how long they had suffered discrimination, as the reasoning of the court below would indicate, only one of the three – Allegheny Pittsburgh Coal Company – would have enjoyed such relief because only it had owned its properties for more than ten years before the circuit court there acted.

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6. Based on the average of the across-the-board annual increases the assessor said she had used for two years (6% in one year and 15% in the next) to gradually raise the assessments of other properties (see, Trans., pp. 112-115), it would take well more than 10 years to bring those properties to the same level of assessment as the petitioners' properties. E.g. if that average were 11%, and the ratio of disparity is only 3 to 1 (instead of the 10 to 1 disparity shown here), it would take 10 years for 11% compound annual growth in the value of an amount for it to triple in value.

Since each of the three complaining taxpayers in *Allegheny Pittsburgh* had, from the first year they experienced such discriminatory assessments, challenged them, it cannot be the case that only because no seasonal cure for such discrimination materialized in later years, were they granted relief for all years – including the initial years – when, under the view of the court below, seasonal relief would still have been a theoretical prospect.

Thus, one cannot read this Court's holding in *Allegheny Pittsburgh* to mean that the seasonal cure doctrine's pragmatic moderation of Equal Protection rights is intended to protect the assessor's long-standing "welcome stranger" assessment practice from immediate constitutional scrutiny on the theoretical possibility that it will be corrected in time to effect a seasonal cure.

Accordingly, it is clear that the relative undervaluation of comparable properties in Monroe County over more than a decade denied Mountain America and the other Walnut Springs lot owners the equal protection of law – even in the later years of that decade when those petitioners first acquired their properties and were, instead, assessed on the basis of the much higher prices they paid. To vindicate this Court's holding in *Allegheny Pittsburgh* to that effect, the ruling of the court below to the contrary should be reviewed.

IV. The institutional interest of the county commission in the fiscal affairs of the county, as it considered the merits of the petitioners' objections to their *ad valorem* property tax assessments, constituted a facial violation of their rights to Due Process.

This Court has recognized that, to secure due process for litigants, "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927). To satisfy a person's due process right to have his case judged by a neutral tribunal, even the appearance of improper bias in the tribunal must be avoided. *See Offutt v. U.S.*, 348 U.S. 11, 14 (1954).

Moreover, there should be no doubt but that the requirement for an unbiased tribunal applies in civil as well as in criminal matters. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). In civil matters involving taxation, it is certain that, before a person is irrevocably relieved of his money, he must be given notice and a reasonable opportunity for an *impartial* administrative tribunal to hear any objections to such taxation. *See McGregor v. Hogan*, 263 U.S. 234, 237 (1923); *Turner v. Wade*, 254 U.S. 64, 67-68 (1920) (emphasis added).

In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), this Court was asked to decide whether, absent a personal, pecuniary interest, executive responsibilities for governmental finances alone were enough to

disqualify a mayor from acting in a judicial capacity. Answering affirmatively, this Court held that:

> [p]lainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.' *Ward*, 409 U.S. at 59 (citing *Tumey v. State of Ohio*, 273 U.S. 510 (1927)).

Nevertheless, in West Virginia, the county commission, the primary body concerned with superintendence of a county's fiscal affairs, also reviews taxpayers' objections to their property tax assessments. W.Va. Code §11-3-24. As to such an arrangement, former West Virginia Supreme Court Justice Richard J. Neely observed in his dissent in *Rawl Sales & Processing Co. v. County Commission of Mingo County*, 191 W. Va. 127, 133, 443 S.E. 595, 601 (1994), that:

> The county commission lacks expertise in property evaluation but is extraordinarily knowledgeable about the government's need for money, an ingrained bias that is particularly harmful to non-voting entities. Although someone should review the assessor's property evaluation, assigning this important

> review to the county commission is perhaps not a scheme whose design would prompt nomination for the Nobel Prize in jurisprudence. Indeed, a hearing before a county commission on a tax appeal is probably best described by the old Jewish expression ['[f]rom your mouth to God's ear.']

Id. at 132, 600 (Neely, J., dissenting).

Thus, West Virginia's statutory arrangements for review of property tax assessments are designed so that the reviewing body's institutional fiscal interests are aligned in favor of the assessment being challenged. In response to the due process objections raised by the petitioners, the court below, citing one of its recent holding in *In re Tax Assessments of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2009) [*Woodlands*], held that the county commission's fiscal responsibilities did not create so great a conflict as to violate their rights. Opin., p. 22-23.

On that basis, alone, this Court should review the ruling of the court below. Moreover, as the following subdivision reveals, the bias of the county commission was more than merely "institutional" and was manifested in its actions.

V. The personal pecuniary interest of the individual members of the county commission, in the outcome of its review of the petitioners' objections to their ad valorem property tax assessments, violated the petitioners' rights to Due Process.

In *Woodlands*, the court below ruled that only a direct pecuniary interest by the members of the county commission – apparently personal instead of official in nature – could sustain a taxpayer's due process claim based on their conflict of interest. *Id.* In so doing, the court below chose to disregard the direct, pecuniary interest the county commissioners have in the outcome of property tax assessment challenges by virtue of the express terms of West Virginia's statutes setting the compensation for those officials.

Specifically, the West Virginia legislature found that there should be "a direct correlation" between the amount of the assessed value of property in a county and the amount of the compensation to be paid its various elected officials, including county commissioners. W.Va. Code § 7-7-1. Thus, the legislature established a sliding scale of statutory compensation for county officials that rises in amount as the assessed valuation of the property in the county increases. W.Va. Code §§ 7-7-3 and 7-7-4. Moreover, as the evidence in this case indicates, by virtue of those statutory provisions, the salaries authorized for the members of the county commission, did, in fact, increase – in large measure because of the substantially increased assessments they sustained against the petitioners. *See*, Tr., p. 19; Ptrs' Ex. 11.

For the year in question, the total gross assessed valuation of all property in Monroe County, including land, improvements and personal property, increased more than $30 million over that total for the preceding tax year.[7] Under the compensation scheme, the result of that increase, more than one-third of which being attributable to Walnut Springs, was that Monroe County moved from compensation classification 9 to classification 8. W.Va. Code § 7-7-3.

Thus, as a result of their actions in upholding the assessed values set by the assessor for 2007 taxes, each of the members of the county commission became entitled to salary increases for their part-time positions. Specifically, for 2006, the statutory salary for the part-time position of a county commissioner in a Class 9 County was $ 24,420, while the salary for a county commissioner in a Class 8 County was $25,080, a difference of $660. W.Va. Code §7-7-4(e)(5).

Nevertheless, when confronted with such law and facts, the court below determined it need not address the apparent conflict because: (1) it had otherwise concluded that, substantively, the assessor's valuations of the petitioners' property were not excessive and (2) it questioned the substantiality of the conflict. Opin., p. 27. To determine, at the least, whether such a substantiality exception to this Court's rulings about disqualifying conflicts of interest should be recognized, the ruling of the court below should be reviewed.

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7. See, Ptrs' Ex. 13 and *2006 Monroe County Real and Personal Property Books*, a judicially noticeable public record.

In considering whether this case presents a situation whereby, the circumstances of the personal pecuniary interest of the members of the county commission, in ruling against the petitioners' objections, violates the petitioners' due process rights, this Court should also consider various other prejudicial actions taken by the county commission in reaching that ruling.

First, in West Virginia, county commissions only review property tax assessments during the month of February, thus leaving taxpayers with scarce time to prepare objections to their assessments once notified of them a few weeks earlier. W.Va. Code § 11-3-24. The brevity of such an opportunity for review often is made more acute by the provision of the law which allows the county commission to terminate such reviews as early as the fifteenth (15th) day of February. *Id.*

Because the county commission, in fact, chose to end its consideration of the petitioners' appeals on that earliest possible day, the time allowed to the various petitioners to receive the mailed notice of their assessments, to notify the commission of their desire to appeal, to engage counsel and an appraiser and to prepare evidence to support their objections was even more tightly constrained. Here, the prejudice of that abbreviated time frame was compounded by the fact that many of the petitioners' mailing addresses, listed for purposes of notification, are out-of-state addresses.

Second, even more damaging to the petitioners' due process rights was the county commission's decision to file a response to the petitioners' appeal to the circuit court, notwithstanding that the commission was the

tribunal authorized to determine the merits of the petitioners' claims. Moreover, the substance of the county commission's response, challenging the status of all but one of the petitioners as parties to the appeal, and attempting to rewrite its own order by asserting new grounds for it, evidences a lack of impartiality in its own right. Furthermore, any such subsequent order-embellishing response by the commission to the petitioners' appeal is inappropriate and untimely, since its authority to review assessments ended six (6) weeks earlier. W.Va. Code § 11-3-24. Thus the petitioners' due process rights are further prejudiced, inasmuch as such response, in effect, constitutes an additional ground in support of the assessment to which petitioners have no opportunity to respond with evidence.

Thus the "ingrained bias," recognized by former Justice Neely, *supra.*, was particularly exacerbated here when the county commission, after ruling adversely on the petitioners' cases, insisted that it was a proper party litigant adverse to their appeal of its own ruling.

Finally, under West Virginia law, while reviewing tax assessments, a county commission may propose an increase in *any* property's taxable value beyond that proposed by the assessor, and such increase may be finalized after giving the affected property owner as little as five (5) days prior written notice. W. Va. Code § 11-3-24. In this matter, the county commission exercised that option to raise the tax assessment on the property of Esther Halperin, the 83-year old mother of petitioner and Walnut Springs developer, Jonathan Halperin. Earlier, on January 9, 2007, Ms. Halperin received notice that the assessor set the 2007 taxable value of her

property at $ 6,480, which she found acceptable and did not seek review by the county commission. However, one day after the hearing on the other petitioners' assessments, the commission, issued, without explanation to Ms. Halperin, a new "Notice of Increase in Assessment" for her property raising its taxable value to $ 302,160.

Thus, the questions about prejudice to the petitioners' due process rights raised by the foregoing arrangements indicate the need for this Court's plenary review of the ruling of the court below.

VI. The cumulative effect of the process by which the petitioners were required to challenge their *ad valorem* property tax assessments, as administered by the assessor and the county commission and as construed by the courts below, constituted a violation of the petitioners' rights to Due Process.

When considering the due process adequacy of a particular adjudicatory arrangement, this Court has often applied a three-factor, sliding scale standard in such matters. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). Those factors to be concurrently weighed and balanced are: (1) the nature of the individual interest to be affected by official action; (2) the risk of erroneous deprivation of such interest under current procedures and the efficacy of greater safeguards to reduce such risk; and (3) the government's competing interest in the particular function involved and in avoiding any fiscal or administrative burdens that greater safeguards would likely entail. *See id.* at 335.

Thus, the government's interest in avoiding disruption of its revenue sources (the third *Matthews* factor) must be balanced against the risk of depriving a taxpayer of more in taxes than he rightfully owes (the second *Matthews* factor). In the context of the county commission's review of proposed property tax assessments in West Virginia, the second *Matthews* factor should include the "ingrained bias" of the commission.

Moreover, both on its face and through its practical operation, the West Virginia scheme for review of property tax assessments presents a system which confronts taxpayers with limited notice, with a narrow opportunity to prepare and present objections, with enhanced burdens of proof and standards of judicial review to overcome and with an array of local officials all institutionally interested in maximizing tax assessments.

Specifically, West Virginia law only requires that taxpayers receive notice of increased real property tax assessments within fifteen (15) days before the county commission meets to review any objections to those assessments. W.Va. Code § 11-3-2a. At the same time, the primary grounds for a taxpayer to challenge the proposed taxable value of his property are: (a) that the proposed taxable value is not equalized in relation to the proposed taxable values of other, similar property, (W.Va. Const. Art. X, § 1) and/or (b) that the proposed taxable value is excessive because it exceeds the property's true and actual value. W. Va. Code § 11-3-1

Integral to raising a challenge to a proposed taxable value on either ground is timely access to information about the proposed taxable values and market values of other taxpayers' properties. As a practical matter, given

the short time between notice of increased assessments and the county commission's review of objections, a taxpayer often has only thirty (30) days to obtain copies of the assessor's proposed property books by filing a Freedom of Information Act (FOIA) request and to engage the services of an appraiser to perform a thorough survey of recent comparable property sales.

Many of these costly and inconvenient actions are beyond the means of most individuals and small businesses. Moreover, given the brief period between when a taxpayer receives notice and the time he must present a challenge to that value, there is little practical opportunity to effectively use such data.

This Court has held that "[t]he fundamental requisite of due process of law is the opportunity to be heard . . . [with such hearing] at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) In the present context, such principles of due process require that a taxpayer have timely and adequate notice detailing the reasons for the assessments, and a reasonable opportunity to prepare and present a challenge of the same to an impartial official. Such circumstances have little in common with West Virginia's system for tax assessment review.

Further, under the decisions of the court below, the challenges, facing those seeking review of their assessments before the county commission, are compounded by the imposition of an enhanced burden of proof ("clear and convincing evidence" as opposed to a simple "preponderance of the evidence"). Opin., p.32 To the contrary, this Court has held that in certain circumstances such a higher burden of proof itself may

constitute a denial of due process. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 at 617-618 (1992).

Here, however, citing its earlier holding in *Woodlands*, the court below held that imposing the "clear and convincing" burden of proof on taxpayers appearing before the county commission, in their only opportunity to present evidence challenging their property tax assessments, did not rise to a due process violation. Opin., p. 32.

Likewise, an earlier decision of the court below also specifically set forth the relatively high standard, by which a West Virginia circuit court reviews the county commission's decision, to-wit: "whether the challenged property valuation is supported by substantial evidence, . . . or otherwise is in contravention of any regulation, statute, or constitutional provision,." *American Bituminous Power Partners, L.P.*, 208 W.Va. at 250, 254-55, 539 S.E.2d 757, at 761-62 (internal citations omitted).

To the contrary, under the rulings of this Court, the constitutional problem, with having cases heard at the first adjudicatory level by an inherently biased tribunal, is exacerbated when the taxpayer is confronted with a high standard of review upon an appeal of that tribunal's decision. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (citing *Tumey v. State of Ohio*, 273 U.S. 510 (1927)).

Moreover, even if the process for judicial review were more availing, that would not cure the flaws in the initial hearing that should be, but is not, before an impartial tribunal. As this Court has recognized, even an adequate appeal process will not cure the failure to provide a neutral

and detached adjudicator in the first instance. *Concrete Pipe*, 508 U.S. 602 (1993).

The right of taxpayers to obtain judicial review under the West Virginia statute is further constrained in at least two other ways. First, the county commission is not required to even issue a written decision – much less to provide any reasons for it. Second, the brief time to perfect the appeal (complete with the entire record including a transcript), to-wit: thirty (30) days from the adjournment of the commission's hearing – likely discourages many taxpayers from exercising their appeal rights. W.Va. Code § 11-3-25.

Finally, although it is the assessor's proposed assessment of the taxpayer's property that is at issue, during the hearing before the county commission, the statute directs the assessor to "attend and render every assistance possible [to the commission] in connection with such [proposed taxable values]." W.Va. Code § 11-3-24. In effect, a county commission has, in the assessor, a statutorily assigned advocate for its interests in maximizing its revenue, while at the same time the county commission is operating under the legal fiction, indulged by the court below, that it is a neutral judge of the very matter that directly affects its fiscal interests.

Likewise, although the elected county prosecuting attorney is, by law, the general legal counsel to the county commission, (*See* W.Va. Code § 7-4-1), under prior rulings of the court below, in the context of a hearing before a county commission reviewing a taxpayer's objection to his assessment, both the county commission and the assessor are entitled to call on the prosecuting attorney to assist

them at that hearing. *See In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983). The duplicity and conflicts inherent in the structured interplay of such multiple roles of the assessor, the prosecuting attorney and the county commission stand in stark contrast to the standard of a neutral hearing that due process contemplates.

Taken collectively, the various prejudicial aspects of the West Virginia's property tax appeals system weigh heavily against the "appearance of justice." *See Louk v. Haynes*, 259 W. Va. 482, 223 S.E.2d 780 (1976) (finding failure of due process because the judge was not impartial and failed to recuse himself). In *Louk*, 259 W.Va. at 500, 223 S.E.2d at 791, the court below quoted a ruling of this Court: to-wit: "to perform its high function in the best way 'justice' must satisfy the *appearance of justice*." *Offutt v. United States*, 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133, (1955). (emphasis added)

Thus, even if, taken in isolation, any one of the above-described prejudicial arrangements are not seen, alone, as enough to support a conclusion that the system lacks the appearance of justice, cumulatively, they do. As the court below has otherwise recognized, prejudice may result from the cumulative effect of errors so that the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *See State v. Walker*, 188 W. Va. 661, 425 S.E.2d 616 (1992), Syl. pt. 5.

For these reasons, in this and every other case under West Virginia's system, taxpayers' rights to due process may be said to have been violated. Thus, the ruling of the court below upholding such system ought to be reviewed by this Court.

CONCLUSION

Grant of certiorari and reversal of the judgment of the court below is necessary to prevent erosion of this Court's mandates recognizing the role of Equal Protection rights in the context of *ad valorem* property taxation and protecting Due Process rights when the exercise of adjudicatory authority is contaminated by official or personal conflicts of interest and other prejudicial arrangements. That this Court's unanimous holding in *Allegheny Pittsburgh*, recognizing the role of Equal Protection rights in such matters, reversed a 1988 ruling of the court below here serves to emphasize the threat of such erosion. Accordingly, for all the reasons stated above, the petitioners pray that this Honorable Court grant this petition for a *writ of certiorari.*

Respectfully submitted,

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